

V. 3444  
223

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

KIERAN JAMES MAURIETTA, )  
)  
Petitioner-Appellant, )  
vs. ) NO. 21714  
)  
STATE OF ARIZONA, )  
)  
Respondent-Appellee. )  
\_\_\_\_\_ )

RESPONDENT-APPELLEE'S ANSWERING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF ARIZONA

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ATTORNEYS FOR THE RESPONDENT-APPELLEE

Filed this \_\_\_\_\_ day of July, 1967.

**FILED**

JUL 3 1967

CLERK OF THE NINTH CIRCUIT COURT OF APPEALS

WM. B. LUCK, CLERK

JUL 10 1967



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## STATEMENT OF THE CASE

The Petitioner-Appellant, KIERAN JAMES MAURIETTA, was arrested by the Pima County, Arizona, Sheriff's Office on the 27th day of February, 1967, for the crime of Obtaining or Attempting to Obtain Money or Property by Means of False or Bogus Check, a felony. On the 6th day of March, 1967, and on the 7th day of March, 1967, preliminary hearings were had and the justices of the peace found probable cause to believe that the Petitioner-Appellant had committed the crimes with which he was charged and the Petitioner-Appellant was held to answer to the Superior Court of Arizona, in and for the County of Pima. He was held to answer on two counts of "Bogus Checks" at the March 6, 1967, preliminary hearing and one count of "Bogus Checks" at the March 7, 1967, preliminary hearing. On March 17, 1967, an information charging the Petitioner-Appellant with three counts of "Bogus Checks" was filed in the Superior Court of Arizona, in and for the County of Pima.

The Petitioner-Appellant after his preliminary hearings and prior to being committed to the State Mental Hospital at Phoenix, Arizona on the 16th day of May, 1967, filed with the United States District Court for the District of Arizona a document entitled:



"Petition for Removal of Criminal Cases from Superior Court of Pima County into United States District Court, Tucson, Arizona, under Title 28, U. S. C. A., Sections 1443, 1446, 1447, 1448, 1449 and 1450." The files of the Clerk of the Superior Court of Pima County indicate that his Petition was filed with that court on March 24, 1967, at 3:58 P. M. ; a copy of said Petition is attached hereto. The Honorable James A. Walsh, Judge of the District Court, by Minute Entry dated the 14th day of March, 1967, denied Petitioner-Appellant's Petition deeming it wholly without merit and denied his petition to proceed in forma pauperis. A copy of the Minute Entry is in this court's record. Petitioner-Appellant has appealed to this Court asking that this Court "overrule" Judge Walsh's denial and "reverse and remand the case" for a "full hearing" on Petitioner-Appellant's "Removal Petition as a matter of right."



## SUMMARY OF ARGUMENT

The argument of the State of Arizona in opposition to the argument of Petitioner-Appellant consists of two basic points:

1. The Petitioner-Appellant was never properly before the United States District Court in that his petition did not allege facts which would permit removal.

2. The Petitioner-Appellant was not hurt by the proceedings in the United States District Court in that if the court had not rejected his petition and had permitted him to proceed in forma pauperis, the Petitioner-Appellant's allegations were not sufficient under the Civil Rights Act to entitle him to removal.





removal under the Civil Rights Act.

The Act itself, in Section 1446 (a) provides in part:

"A defendant . . . desiring to remove any . . . criminal prosecution from a state court shall file in the district court of the United States . . . a verified petition containing a short and plain statement of the FACTS WHICH ENTITLE HIM TO REMOVAL . . ." (Emphasis Supplied)

None of the FACTS which were alleged in the Appellant's petition, assuming they are facts, entitle him to a removal under the Civil Rights Act.

The Supreme Court of the United States said in the City of Greenwood, Mississippi v. Peacock, 86 A S. Ct. 1800 (1966) 16 L ed 2d 944, 384 U.S. 808,

"Under 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that these rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. State of Georgia v. Rachael, supra; Strander v. State of West Virginia, 100 U.S. 303, 25 L ed 2d 664."

The Petitioner-Appellant has not alleged any facts or circumstances which meet this test.

The Appellant argues that by his filing of a copy of his "Removal





Petition" the removal was effected and that the Federal Court had to remand him. He is probably referring to Subsection (e) of Section 1446 which says:

"Promptly after the FILING OF SUCH PETITION and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State, court which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." (Emphasis Supplied)

Subsection (e) in referring to "such petition" is referring back to Subsection (a) of Section 1446, to the "verified petition containing . . . facts which entitle him . . . to removal . . ." It is the State of Arizona's position that there cannot be a removal under Subsection (e) until there has been a compliance with Subsection (a). It follows that if there was no removal there need be no remand.

If it were not true that there must be a proper allegation of facts then the legislature would not have said that the defendant "shall" file one. As was pointed out in the Peacock case (supra):

". . . In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire nation; in fiscal 1964 there were 43. The present case was decided



by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone. But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of § 1443 (1), then every criminal case in every court of every State -- on any charge from a five-dollar misdemeanor to first-degree murder -- would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendant's innocence or guilt. "

The court in using the foregoing language has pointed out a very practical difficulty which would arise if the Petitioner-Appellant's contentions are correct. That is, there would not be enough Federal judges or courtrooms to have all the hearings that would be necessary. The delay which this would obviously





cause in the state court proceedings would be of tremendous proportions and the idea of a speedy trial would be reposed in the defendant only. If the defendant chose, he could automatically get a delay by filing a petition in the federal court and the federal courts would be overburdened with hearings on motions to remand. No more basis for removal would need be alleged than the Petitioner-Appellant has alleged in this case.

Referring to page one of Respondent-Appellee's Answering Brief, the various bases for removal alleged in Petitioner-Appellant's original petition have been enunciated. None of these alleged "denials" refers to any "civil right" arising under a law of the United States. Even assuming that the Honorable James A. Walsh was in error in rejecting the Petitioner-Appellant's petition and should have allowed him to proceed in forma pauperis, this court should not remand the matter but should declare that the Petitioner-Appellant has not been harmed because there are no allegations of merit in his petition. As was said in Chestnut v. People of State of New York, 370 F 2, page 1, (1966):

" \* \* \* It is essential for removal that the prosecution be '[a]gainst any person who is denied or cannot enforce [one of his civil rights] in the courts of such state,' and that the



right must be one arising 'under any  
law providing for the equal civil rights  
of citizens of the United States.' ''  
(in order to remove a case under  
Section 1443 (1).)





CONCLUSION

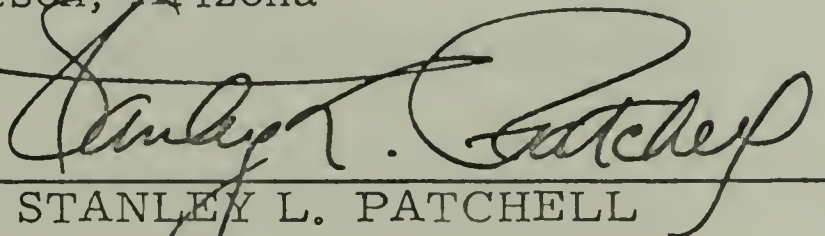
Therefore, even if all the allegations of the Petitioner-Appellant's Petition for Removal are absolutely true, he has still not alleged the denial of any civil right to which he is entitled under any law of the United States.

The Minute Entry Order of the District Court should be affirmed.

Respectfully submitted this 30th day of June, 1967.

WILLIAM J. SCHAFER III  
Pima County Attorney  
300 Transamerica Building  
Tucson, Arizona

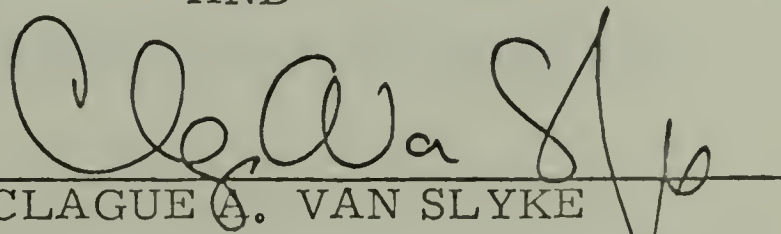
By



STANLEY L. PATCHELL  
Deputy County Attorney

AND

By



CLAGUE A. VAN SLYKE  
Special Deputy County Attorney

ATTORNEYS FOR THE RESPONDENT-  
APPELLEE



## APPENDIX

### TITLE 28, U. S. C.

#### SECTION 1443 CIVIL RIGHTS CASES

Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

#### SECTION 1446 PROCEDURAL FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a state



court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) . . .

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) . . .

(e) Promptly after the filing of such petition and bond (referring to Subsection (d), the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the state court, the district court shall issue its writ of habeas corpus, and the marshall shall thereupon take such defendant or



defendants into his custody and deliver a copy of the writ to the clerk of such state court.





(Copy of said Petition referred to in Respondent-Appellee's Answering Brief on page two is attached herewith).

PETITION FOR REMOVAL OF CRIMINAL  
CASES FROM SUPERIOR COURT OF PIMA  
COUNTY INTO UNITED STATES DISTRICT  
COURT, TUCSON, ARIZONA, UNDER TITLE  
28, U.S.C., SECTIONS 1443, 1446, 1447,  
1448, 1449 and 1450



Tucson, Arizona

MAR 21 3 5

FRANCIS P. I.  
CLERK SUPERIOR  
BY C. P. Mason  
DEPUTY

To: The Honorable Clerk  
United States District Court  
Federal Building  
Tucson, Arizona  
March 8<sup>th</sup>, 1957

—Petition for removal of Criminal Cases from Superior  
Court of Pima County into the United States  
District Court, Tucson, Arizona.—

Submitted by: Kieran J. Maurietta  
Pima County Jail  
P.O. Box 910  
Tucson, Arizona

File No. 91, U.S. District  
Court, Tucson, Arizona.)

Exhibit No. A-15768,  
(your file.)



Tucson, Arizona.

United States of America /

Pima County, Arizona / SS

Kieran J. Maurietta,  
Petitioner,

vs.

State of Arizona,  
Respondent.

Petition for removal  
of Criminal cases  
from Superior Court  
of Pima County into  
U.S. District Court,  
Tucson, Arizona,  
under Title 28, U.S.C.  
Sections 1443, 1445, 1446,  
1448, 1449, and 1453.

Kieran J. Maurietta, Petitioner herein  
after first being duly sworn upon oath,  
deposes and says:



That he has notified the Clerk of Superior Court Tucson, Arizona of this action, and as soon as same is filed in this Court he shall send a copy of this Petition to the said Clerk of said Court, which is possessed of the records, to effect the removal as provided by law;

Qualified Paupers' Oath;  
Motion to file and proceed in forma pauperis, and Motion for appointment of Counsel, consolidated, under Title 28, U.S.C., Sec. 1915.

1. That he is a citizen of the United States and the State of Illinois by virtue of birth, and he is of legal age;

2. That he brings this (his) Petition in good faith;

3. That he has had no training in the science of law, and he urges this Court to give this (his) Petition impartial construction and to interpret the rules of procedure liberally in his favor;

4. That he is in debt more than \$1,400, and he has sent this Court his Civil Motion for recovery of \$1,200 as fully set out hereon;

5. That he cannot spend funds for his criminal proceeding without approval of the party to whom he is indebted most;

6. That he believes the party concerned will let him pay the filing fee hereon upon recovery of his suit \$1,200;





Petition for Removal of Criminal Case from Superior Court of Pima County, Arizona into the U.S. District Court, Tucson, Arizona, on Title 28, U.S.C., Secs. 1443, 1446, 1447, 1448, 1449, 1450.

## Statement of Fact

Petitioner was arrested at Tucson International Airport on or about February 27th, 1967, by one Captain John Doe (whose last name is believed to be "Williams"), a deputy sheriff of Pima County, Arizona.

Petitioner was charged with <sup>with</sup> obtaining or attempting to obtain money or property (from banks) by bogus checks. He was lodged in Pima County Jail where he remains unto this day.

After Petitioner was locked up, the said Captain searched Petitioner's personal effects and placed them to an airport locker. The said Captain went or sent others to the said locker and searched and seized therefrom <sup>clothes</sup>, clothes, and personal items belonging to Petitioner.



for recovery of \$1,200.00 clothes and personal effects plus damages for said unlawful search and seizure.

Meantime, for 48 hours Petitioner was held completely incommunicado from all attorneys until the said unlawful seizure was effected and Petitioner obtained a written Court Order from Justice of the Peace Clark H. Johnson granting his right to contact attorneys.

By the time attorneys were at last permitted to see Petitioner, Petitioner's funds had been already seized and he was unable to retain Counsel.

Petitioner appeared for Preliminary Hearings before Justices of the Peace Joe Jacobson and Clark H. Johnson, cases nos. 5935 and 27540, respectfully, on March 6th and 7th, 1957.

(Both cases arise out of a single, alleged offense.)

At neither hearing did Petitioner have either a Court Reporter or attorney although he repeatedly moved for and demanded both at each of his hearings. Therefore, very little of my testimony, Cross-examination, or statements can accurately be remembered by anyone.

Justice Jacobson is a Justice of the Peace and a Court Recorder because Petitioner did not give



several deputy sheriffs inside 24-hour prison  
notice for Court Reporter for his hearing before  
Justice Johnson.

Justice Johnson acknowledged the notice but  
refused Petitioner's request because it was made by  
telephone rather than in writing.

Neither Justice wanted Petitioner to have  
either a Court Reporter or an attorney and both  
Justices used every technicality to deprive your  
Petitioner of his rights.

Both Justices denied your Petitioner's  
motions to continue the hearings so that Petitioner  
could send the Justices written notices for Court  
Reporters.

Both Justices repeatedly denied Petitioner's  
six (6) or eight (8) motions and demands for  
appointment of Counsel even after Petitioner  
reminded them of U.S. Supreme Court Decisions.

Justice Jacobson tried to convince Petitioner  
he had no right to remove his case into Federal  
Court, and, of course, both Justices bound Petitioner  
over to Superior Court. Each Justice set bond at  
\$2,000 for a total bond of \$11,000.





Petitioner is unable to enforce his constitutional rights in Arizona State Courts. His Preliminary Hearings were a farce, a mockery of justice. No record of the hearings exist upon which to predicate appeal. If the alleged hearings, Petitioner was not allowed to cross-examine witnesses fully and freely; his requests for Court Reporters were refused; his motions and demands for Counsel were denied, and his personal funds (\$1,200) have been unlawfully seized.

### Conclusion and Prayer

Wherefore, Petitioner prays as follows:

1. That all motions and requests herein be granted forthwith;
2. That a Writ of Habeas Corpus issue, forthwith, taking Petitioner out of the custody of the Sheriff of Pima County, Arizona and placing him into the custody of the United States Marshal;
3. That for the violations of Petitioner's constitutional rights, Petitioner be discharged and set at liberty.





petition, by Counsel or personally, be reserved;

5. That this Court order and direct county or/and State official to return to Petitioner all of Petitioner's \$ 1,200, clothes, and personal items forthwith. (An affidavit follows.)

Respectfully Submitted,  
*Kiernan J. Mauriotta*

Petitioner pro se

Subscribed and sworn to before me, a Notary Public  
on this 9~~th~~ day of March A.D. 1915

Notary Public

Commission Expires: \_\_\_\_\_

*John J. ...*



Affidavit

Kieran J. Mauriotta,

Affiant, being first duly sworn upon oath deposed  
and says he has read the foregoing Petition, by  
him made and subscribed, and the same is true  
and correct to the best of his knowledge and belief.

*Kieran J. Mauriotta*  
\_\_\_\_\_  
Affiant

\_\_\_\_\_  
Attest

Notary Public

*John W. ...*



Supplemental Affidavit

Kieran J. Mauricita, Affiant, being first duly sworn upon oath before God, his Supreme Witness, and others, deposes and says he twice requested of Jail officials to call a Notary Public (or the U.S. Marshall or / and U.S. Commissioner) for formal notarization of his enclosed Petition for Removal, and today he was advised by Lt. Putney, a Deputy Sheriff at the Pima County Jail, that formal notarization of legal papers is not necessary in the State of Arizona, and;

Therefore, Affiant submits his said petition without any formal notarization altho he prefers same in case of appeal outside the State of Arizona.

Respectfully Submitted  
*Kieran J. Mauricita*  
Affiant

Before God on this 9th day of March, 1967

Witnesses

1. Bobby D. Dixon

2. Richard Brown

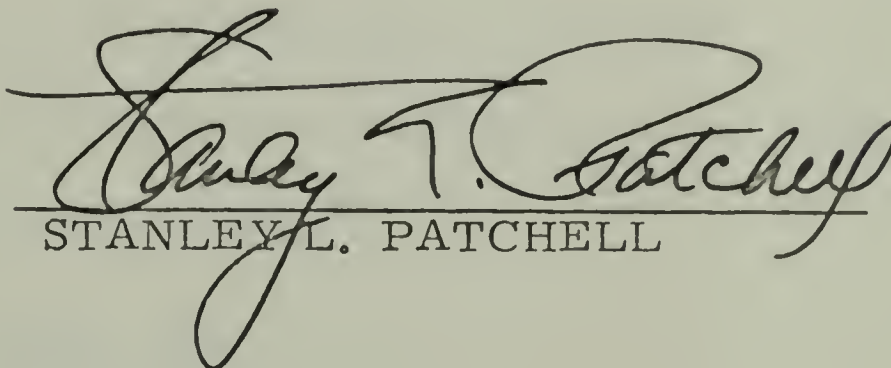
3. Bobby Jordan

4. Paolo Cannon





I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
STANLEY L. PATCHELL





